

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Filed

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FILE: B-215859; B-215859.2 **DATE:** November 14, 1984

MATTER OF: L.B. Samford, Inc.; Geiger Company

DIGEST:

1. A bidder's failure to acknowledge a material amendment may not be waived on the basis that the bidder did not receive the amendment where there is no evidence of a deliberate effort by the agency to prevent the bidder from competing on the procurement.
2. A solicitation amendment is material where the requirements added by the amendment will affect the quality of performance in more than a negligible way.

L.B. Samford, Inc. protests the rejection of its bid as nonresponsive under invitation for bids No. DABT10-84-B-0156, issued by the Department of the Army for the replacement of the air conditioning and heating system in designated buildings at Ft. Benning, Georgia. The Army rejected Samford's bid for failure to acknowledge an amendment which the contracting officer determined was material because it goes to the substance of the bid. Samford contends that its bid was improperly rejected.

We deny the protest.

The IFB was issued on June 15, 1984 and amendment No. 0001 was subsequently issued on July 2. The amendment:

(1) incorporated in the Solicitation Provisions a warranty of construction clause, requiring that work performed under the contract conform to the contract requirements and be free of any defect in equipment, material or design furnished, or workmanship performed for 1 year after final acceptance of work;

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(2) changed the latest revision on drawing No. DEH-27320 to a revision which specified that bidders "provide rectangular type, sectional cast iron boiler with burner and gas train;" and

(3) made the following changes in the specifications concerning the hot water heating system:

(a) added an exception to the requirement that the boiler be factory assembled, providing that a sectional cast iron boiler may be field assembled if assembled under the supervision of a factory representative who shall provide written certification to the contracting officer that the boiler is properly assembled and ready for testing and operation;

(b) changed the performance requirement for the boiler from "gross output capacity" of not less than 140,000 British thermal units (BTU's) per hour to "net capacity" of not less than 140,000 BTU's per hour;

(c) added a requirement that the boiler be tested and rated in accordance with the Hydronics Institute I-B-R and SBI Testing and Rating Standard for Cast Iron and Steel Heating Boilers or ANSI-Z21.13; and

(d) changed a requirement that the boiler have "high-low-off combustion controls" to "fixed rate, on-off combustion controls."

At bid opening on July 16, Samford submitted the apparent low bid, while Geiger Company was the next low bidder. Samford's bid, however, failed to include an acknowledgment of the amendment. The contracting officer then determined the amendment to be material and rejected Samford's bid as nonresponsive.

Samford contends that it never received the amendment and it therefore was unable to acknowledge the amendment.

It further contends that the amendment was immaterial because the changes were minor and would not affect its bid and therefore its failure to acknowledge the amendment can be waived as a minor informality. In support of this view, Samford states that the mechanical subcontractor providing the boiler had received the amendment prior to submission of its quotation to Samford and has advised Samford that the changes in the amendment did not affect its quotation. Samford also submitted statements from two other mechanical contractors that the amendment did not affect the cost of materials on this project. Samford adds that even if this amendment was material, its failure to acknowledge the amendment did not affect its total bid price because its proposed mechanical subcontractor considered it in formulating its quotation.

The Army states that its records suggest that Samford was sent a copy of the amendment: Samford appears on the bidders' mailing list at its correct address and the other five firms who bid acknowledged receipt of the amendment. The Army cannot account for Samford's failure to receive it. The agency also maintains that the amendment was material because it placed substantial requirements on the contractor. In this regard, the contracting officer was advised by the Project Engineer that the amended specifications and drawings required a 15 percent increase in boiler size and imposed a requirement for a cast iron sectional boiler, which would increase the cost of performance.

We have held that the contracting agency is not an insurer of the delivery of bid documents to prospective bidders. Rather, the bidder bears the risk of nonreceipt of a solicitation amendment. Richard Delene Contracting, Inc., B-212796, Sept. 13, 1983, 83-2 CPD ¶ 321. If a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. KLN Steel Products Company, B-215462, June 25, 1984, 84-1 CPD ¶ 666. In this case, there is neither an allegation by Samford nor any evidence of any deliberate effort by the Army to prevent Samford from competing.

As to whether the amendment was a material one, an amendment is material if it affects the bidder's prices or the quantity, quality or delivery terms of the IFB in more than a trivial or negligible manner. Doyon Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 CPD ¶ 194. Samford has only argued that the amendment was immaterial because the changes would not affect the cost of its bid, a conclusion with which the Army and the second low bidder, Geiger, disagree. Due to the conflicting statements in the record, we are unable to determine from the record the actual impact of the amendment on price. In any event, price is not the only dispositive factor in determining if an amendment is material, Reliable Building Maintenance, Inc., B-211591, Sept. 19, 1983, 83-2 CPD ¶ 344; an amendment is also considered material if it affects the quality of performance in more than a negligible way. Doyon Construction Co., Inc., supra; Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314.

The amendment changed the obligation of the contractor with regard to several of the requirements affecting the quality of performance of the boiler for the hot water heating system. Most importantly, the amendment changed the standard for the performance of the boiler from "gross output capacity" to "net capacity," while maintaining the same number of BTU's per hour. Since an output of more BTU's is required to achieve a net capacity of 140,000 BTU's than a gross capacity of 140,000 BTU's, this change had the effect of increasing the level of performance required. It also had the effect of requiring a 15 percent increase in the size of the boiler in order to achieve the higher level of performance. Further, in this regard, the amendment established a testing and rating standard for measuring the output of the boiler, thus providing a means of ensuring that the contractor meets the required level of performance. The amendment also added the requirement that the boiler be a cast iron section type whereas under the unamended IFB any type of boiler could be provided. This type of boiler is more durable and easier to maintain than others. In addition, the amendment added the requirement for a 1-year warranty. We find that these changes materially affect the quality of the heating system.

These changes in the requirements of the quality of the heating system which the contractor will have to meet would not be legally enforceable upon the bidder unless it acknowledged the amendment. The mere fact that the bidder's subcontractor considered the amendment in formulating its quotation does not make the amendment legally enforceable upon the bidder. Thus, if a contract was awarded to Samford which did not acknowledge the amendment, the Army would bear the risk that the completed system would not meet its needs as they are stated by the amended IFB. See Doyon Construction Co., Inc., supra; El Greco Painting and General Contractors Company, Inc., B-208215.2, Nov. 30, 1982, 82-2 CPD ¶ 492. We conclude that since the amendment made material changes to the IFB, Samford's bid was properly rejected as nonresponsive.

The protest is denied.

for Milton J. Foster
Comptroller General
of the United States